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On Genocide

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Abstract: The crime of genocide is the newest international crime. It must be kept as a separate, distinct, and coherent concept. It is the first truly subjective crime; all other crime, though requiring *mens rea,* require only that the defendant consciously committed the criminal acts. In the case of genocide, however, the underlying criminal acts are no different from the acts required to prove ordinary crimes. The difference is one of motive. What is being punished by the crime of genocide is the selection of victims according to their involuntary membership in four kinds of groups: national, ethnical, racial, or religious. The distinctiveness of this new crime turns on how seriously prosecutors, defense counsel, and judges in future cases take and examine evidence of a defendant's motives.

Tags: Genocide, L.C. Green, International Criminal Tribunals, Convention for the Prevention and Punishment of Genocide, Kovacevic Trial

[pg119]* I'd like to be mentioned, at least in a footnote, in the biography someone will write someday about that great gentleman and scholar, Leslie C. Green. A number of years ago, when Professor Green was not well known in the United States, he submitted some of his essays on international law to Transnational Publishers, Inc. As a member of that board, the publisher, Heike Fenton, called me up and asked for my appraisal of a book containing these essays. She let me know that it would probably be a losing proposition, since essay collections (at that time at least) hardly ever repaid their cost of publication. I had an idea that could suit her and Professor Green at the same time. I suggested to Heike that she might want to consider going back to Professor Green and saying that although she would not be able to publish the particular essays he had submitted to her, she would be very interested if he would submit all the essays he had written on the law of war. Of course I was familiar with these essays, and I thought that their collection in a single volume might work from a publisher's standpoint.

The rest is history. Leslie Green graciously complied by submitting a number of his essays on the law of war, resulting in the book *Essays on the Modern Law of War*. Its fame and fortune grew, and is now in its second edition. It has often been used as a text in military academies, and undoubtedly influenced the Naval War College to extend to Professor Green an invitation to become a holder of the Stockton Chair—unusual for a scholar who is not an American citizen. [pg120] Professor Green has served with distinction as the Stockton Professor of International Law at the Naval War College, and has continued to contribute to the development of the law of war as a leading scholar in that field. I feel lucky in helping to steer his (scholar)ship in the right direction at the right time.

I am contributing some thoughts about Genocide to this collection of essays in honor of my dear friend Leslie Green precisely because genocide is not a topic that appears among his many essays on the law of war. If it had been, I would have felt preempted. Of course, Professor Green has talked about genocide in his discussions of the laws of war, including crimes against humanity (it would have been astounding if he

had not done so). There is nothing he has said about the topic that I could criticize even if I were bold enough to do so. But because he has not contributed a specific essay on the topic, I submit the following essay as a compliment (complement) to his works. Of course, in a way it is too soon to write about genocide. The law on that subject is developing rapidly as the result of the work of the two ad hoc International Criminal Tribunals for the Former Yugoslavia and for Rwanda. In addition, various national courts have recently had occasion to consider charges of genocide. If I were to attempt here an essay that dealt with all the judicial glosses to date on the crime of genocide, it would be outdated the minute it is published. Thus I will confine myself to considerations of a greater generality. I hope these can help illuminate two major underlying factors in the recent and unique international crime of genocide, factors that will undoubtedly persist as a theme in the many judicial developments in the near future that will elaborate upon, specify and further explicate the crime of genocide as applied to particular cases.

The Need for a Coherent Definition

The term "genocide" is popular with journalists because it seems to give an immediate and sensational dimension to their reports. Its overuse extends to academics who see no need to be careful about the terms they use. For example, the well-known political scientist Rudolph Rummel cited as instances of "genocide" (1) "the denial of ethnic Hawaiian culture by the American-run public school system in Hawaii"; (2) "government policies letting one race adopt the children of another race"; (3) "South African Apartheid"; and (4) "the Jewish Holocaust."FN1 As early as 1951, Paul Robeson and William Patterson submitted a petition to United Nations charging "genocidal crimes of federal, state, and municipal governments in the United States against 15,000,000 African-Americans."FN2 Clearly the term "genocide" can be stretched so far as to lose any distinctive or coherent meaning.

[pg121] Coherence is a virtue not just in legal definitions, but in enabling us to think about the relation of any given term to all nearby terms. Ken Kress writes:

> An idea or theory is coherent if it hangs or fits together. If its parts are mutually supportive, if it is intelligible, if it flows from or expresses a single, unified viewpoint. An idea or theory is incoherent if it is unintelligible, inconsistent, ad hoc, fragmented, disjointed, or contains thoughts that are unrelated to and do not support one another.FN3

Coherence is important because it relates to the core responsibility of the judicial Enterprise.FN4 Ronald Dworkin has argued forcefully for the overarching imperative of "law as integrity,"FN5 which

> requires our judges, so far as this is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones.FN6

Professor Dworkin's reference in this quotation to a "coherent set of principles" is later expanded:

> Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation.FN7

These general propositions take on special significance when applied to the judicial definition of genocide, the world's most heinous crime. Genocide is ancient in fact and new in definition. In Biblical times there were acts of deliberate destruction of national, ethnical, racial or religious groups as such. The Turkish slaughter of Armenians in 1915 is now widely regarded as genocide. But the precise term was coined by Raphael Lemkin in 1944.FN8 Lemkin used the new word loosely, including within its scope attacks on political and social institutions, attacks on culture and language, and even attacks on national feelings. His use of the word was so broad that it did not necessarily including the killing or harming of persons.

However, when the horrors of the Holocaust gradually became known to the public at the end of the Second World War, the General Assembly of the United Nations passed a resolution affirming genocide to be a crime under international law. Included in the 1946 resolution were acts of destruction against groups on "religious, racial, political, or any other grounds."FN9 Although the UN's definition was narrower than Lemkin's, the inclusion of "political" and "or any other" [pg122] grounds still made it overly broad. For example, any civil war would automatically constitute genocide because each side would be attempting to destroy the other in order to take over the government—in short, for political reasons. And by adding "or any other grounds," genocide would apply to any war at all.

If in 1944 the concept of genocide was vastly overinclusive, and in 1946 plainly overinclusive, in 1948 the definition was finally pinned down. Not only did the Convention for the Prevention and Punishment of GenocideFN10 present an internationally binding definition, but the words of that definition have been repeated verbatim many times in constitutive instruments of ad hoc international criminal tribunals, the statute of the proposed International Criminal Court, and in various judicial decisions in national as well as international tribunals:

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:
>
> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent births within the group;
> (e) forcibly transferring children of the group to another group.

This language formulated in 1948 was well-chosen. Even though many of the delegates to the drafting of the Genocide Convention had their own agendas to promote, the result of their deliberations is a definition that is remarkably coherent in the sense I have been discussing. This is not to say that the definition is without difficulties; hardly any definition can ever be said to be perfect. Yet with this definition as a reference point, let us consider some of the specific issues that have caused some problems in relation to the

coherency of the crime of genocide: "group," "specific intent," and the relation to "ethnic cleansing." Of course other issues will arise in cases yet unlitigated, but as of the time of this writing, these three topics seem most salient.

Restrictions as to Group Membership

The most immediately notable restriction in the 1948 definition of "genocide" is the exclusion of political groups and the concomitant decision not to make the idea of groups open-ended (in contrast to the 1946 Resolution inclusion of "or any other grounds"). Why were political groups excluded in the [pg123] 1948 Convention even though they had been included in the 1946 Resolution? A sufficient historical reason is that the Soviet Union insisted upon the exclusion of political groups, probably out of a well-founded fear that Josef Stalin could be accused of genocide when he presided over the largest political slaughter in history in the 1930s. But there is a much better logical reason for the exclusion of membership in political groups: such membership is voluntary. Thus, a person who joins such a group in a sense controls her own destiny. To be sure, if she is killed because she is a member of a particular political group, it is still murder. From the international point of view, if civilians are killed because of their membership in a political group (or any group at all), it is still a crime against humanity or (if the killing occurs during armed conflict) a war crime.

"Genocide," to have standing as a separate crime, must be distinguishable from group destruction. The framers of the Geneva Convention settled on a definition that appears to have singled out victims of genocide as *involuntary* members of a group. There is something universally felt to be particularly heinous in murder based on a group affiliation that the victim could not have avoided. Thus, of the four groups listed in the Genocide Convention, it is at the outset clear that membership in "racial" or "ethnic" groups is involuntary; a child is born into such groups by parentage. The "national" group is for the most part involuntary, as it is conferred by birth. In a small percentage of cases people may be able to emigrate and obtain a new nationality, but for the vast majority of people their nationality effectively remains involuntary. Only "religion," of the four categories, is of mixed voluntariness. Most people are born into a religion, and therefore their religious status is involuntary into their teenage years. Later they may "drop out" or affirmatively join a different religious group. Yet they may be targeted in a genocidal campaign because of the religion into which they were born. During the Yugoslavian civil wars in the past decade, where in some provinces Serbs were in the minority and in other provinces Muslims were the minority group, group membership was identified in many cases by the victim's name. Under the Islamic religion, children are given one of a distinctive list of Muslim names, and in former Yugoslavia at least, non-Muslim children were not given any of those Muslim names. Hence the name itself was enough to identify a person as belonging to the religious minority or majority in any given town. If a minority person stated that he had changed his religion, he probably would not have been believed by the persecutors.

An instructive analogue can be drawn between genocide and the recent legislative phenomenon of "hate crimes" in the domestic law of several countries. A hate crime is

generally defined as a crime against person because that [pg124] person is a member of a group that the perpetrator hates. Although the underlying crime is of course punishable under the criminal law, the penalty for the crime is enhanced if it constitutes a hate crime. In a recent shocking case in the United States, a black teenager was walking along on the sidewalk of a white Northern suburb, minding his own business, when he was suddenly attacked and killed by a white teenage gang. The gang had simply determined to kill the next black person who walked by. Although the murder itself was punishable by life imprisonment, the fact that it was motivated by a hatred of the group to which the victim belonged led the sentencing judge to deny the possibility of parole.

Many criminologists and lay observers have lobbied against the enactment of hate crimes on the deceptively simple ground that "a crime is a crime, regardless of motive." To the contrary, I think it is a civilizational improvement to deter especially the crimes and harms committed against people just because of their status as involuntary members of a group. To be sure this kind of "discrimination" has been around since Biblical times, and in the past few centuries the Jews in many countries have been the special target of such discriminatory maltreatment. The Third Reich brought this discrimination to a legislative focus, and if any "good" can be said to have come of the Holocaust, it can only be an enduring legacy that genocide under international law and "hate crimes" under domestic law are a coherent category all their own—a crime more heinous than the underlying criminal act itself.

Specific Intent

There is no doubt that, from a prosecutor's point of view, genocide is a harder crime to prove than most international violations of humanitarian law. It is difficult for the prosecutor to discharge the burden of proving a specific intent to commit genocide. Contrary to popular belief, this difficulty is not due to the fact that genocide is a more serious crime with more serious consequences. Rather, it relates to the fact that motive is a specific intent of the crime itself. Thus, the 1948 Convention in its opening clause uses the word "intent" and each of the enumerated actions begins with the language of intent: "killing," "causing," "deliberately inflicting," "imposing measures intended to," and "forcibly transferring."

Defense attorneys will typically argue that in order to prove genocidal intent, the prosecutor must present evidence of a "plan" of genocide. This might consist of transcripts of a conspiratorial meeting, or a military directive, or some other evidence of a prearranged policy to destroy a national, ethnical, religious, [pg125] or racial group. Presumably these defense attorneys have a mental image like that of the Wannsee Conference depicted in a chilling film of that same name. The movie shows the meeting that took place in a Berlin suburb in January 1942 in which Nazi leaders calmly discussed the complex plans of the "Final Solution." The movie, matching in running time the actual conference, was based on minutes taken at the conference itself and recovered when Germany surrendered in 1945.

I doubt that any international criminal court will accept a defense request that the prosecutor prove a "plan" based on actual minutes or documents of such a meeting as the Wannsee Conference. As a practical matter, it is highly unlikely that any minutes or records will ever be taken again of a conspiratorial meeting to commit genocide; the threat to the participants of future prosecution based on those minutes or documents is sufficient to rule out any such evidentiary compilation in the future. Indeed, a plausible hypothesis based on evidence coming out of the civil wars in Yugoslavia in the 1990s may be that some political and military leaders may have deliberately created records, documents, minutes, and directives that were directly contrary to their verbal instructions. For it would be contrary to rational self-interest for any political or military commander these days to expose himself or herself to future prosecution based on command responsibility. Instead, "plausible denial" might be created by giving face-to-face verbal orders that are contrary to the "paper record" of directives and documents that forbid recourse to violations of international humanitarian law.

But even apart from sophisticated coverups and deniability, the need for a plan is overstated by my hypothetical defense counsel. If during a person intends in his own mind to harm or kill another person based on the victim's membership in one of the enumerated groups, that is sufficient for a charge of genocide. Perhaps if it is a single murder a prosecutor would not prosecute the defendant for "genocide" but only for murder; however, if it is part of an event where the defendant and others are killing innocent people based on the victims' group membership, or if the defendant himself is killing a number of people for that reason, then the charge of "genocide" is in my view supportable.

A more nuanced problem concerning the proof of specific motive to commit genocide came up in the course of the preliminary briefing and truncated trial of Dr. Milan Kovacevic at the International Criminal Tribunal for the Former Yugoslavia. The prosecutor, Michael Keegan, cited public speeches and television appearances by Dr. Kovacevic in which he urged Muslim citizens of Prijedor to leave the town and go elsewhere because, as he put it, Serbs and Muslims cannot live peaceably together. These speeches occurred some [pg126] months prior to the civil war that raged through Prijedor, resulting in a takeover by the Serbs and the killing, raping, and forcible evacuation of most of the Moslem population. Dr. Kovacevic was charged with genocide—the first Serb to be so charged by the Tribunal. The question was whether his public speeches constituted evidence of genocidal intent sufficient to satisfy the requisites of the crime.FN11

As the lead counsel of Dr. Kovacevic's defense team, I met alone with Prosecutor Keegan to discuss plea-bargaining possibilities. He seemed quite convinced that my client's public speeches and television appearances constituted proof of the specific intent to commit genocide. The indictment against Dr. Kovacevic did not charge him of any genocidal decisions or acts; it simply pointed to the existence of the speeches and television tapes and linked them to Dr. Kovacevic's political position as deputy mayor of the town of Prijedor. I asked Mr. Keegan whether the prosecution had any evidence of any directive signed by my client that ordered the commission of any harm toward any

persons in Prijedor, and Mr. Keegan said he had no such evidence. In fact, there was no evidence that my client did anything except the making of public speeches and the signing of routine municipal orders (such as the hour for turning off street lights, decisions as to water supply, and the like).

Mr. Keegan, as a plea bargain, would consider a reduced sentence, but was not willing to discuss changing the charge of genocide to a lesser war crimes charge. I argued that my client, as the director of the Prijedor general hospital, was a man of healing and not a man of killing. In addition, Dr. Kovacevic invariably treated Serbian and Muslim patients equally, and he invited to join his staff at the hospital a number of Muslim doctors who had been the victims of prejudice in other Serbian towns. But Mr. Keegan replied with the image of the Nazi "death doctor" who may have been a man of healing but who did not hesitate to carry out inhuman and deadly experiments on Jewish victims. Our meeting was a standstill; we were too far apart from any plea bargain.

I decided that Mr. Keegan's point was well taken. If he could demonstrate a genocidal intent from the inflammatory speeches that Dr. Kovacevic made, it would be very difficult for me to rebut that intent by testimonials as to Dr. Kovacevic's character as a man of healing. Yet I was convinced from the voluminous evidence and interviews with his family and friends that Dr. Kovacevic would never intentionally harm anyone. Whether I was right or wrong about this was not something I could know for sure, but I was sufficiently convinced of it to throw all my energies into a vigorous defense of this man. I would never argue to the Tribunal that heinous crimes did not occur, or that the Serbs were justified because of historical brutalities against them to commit such crimes. [pg127] Rather, my entire defense would consist of the specific innocence of my client to the charge of genocide.

This brings me to my client's speeches and television interviews which, I was sure, would have a highly negative emotional impact upon the judges of the tribunal when they were read out in court or shown on the courtroom television monitors. They suggested that Dr. Kovacevic was something of a firebrand and idealogue, one who could be held guilty of contributing to a negative atmosphere in Prijedor that made the subsequent attack by the Serbian army and paramilitaries all the more effective and brutal. I was certain that the prosecutor would provide the requisite rhetorical underpinning to the speeches and interviews, leaving me with an uphill battle to explain why those speeches and interviews did not constitute evidence of a specific motive of genocide.

I believed that there was a completely different way to interpret my client's speeches and television interviews. He was doing his best to exhort the Muslim population of Prijedor to leave town before it was too late. Although the Muslim and Serb population in the town was at that time practically equal (at close to 43% each), Dr. Kovacevic knew from his position as deputy mayor that the strategic importance of the Prijedor corridor from the Serbian military point of view made inevitable a military takeover by the Serbian army. And indeed that is what happened in April 1992, followed

by forced evacuations of Muslims and internment in detention centers, often under brutal conditions. Some Muslims were tortured and killed in those camps.

I go into this level of detail to show that two diametrically opposite interpretations are possible of the same speeches by a public official such as Dr. Kovacevic. He could either have been contributing to an atmosphere of hatred or doing his best to protect people whom he knew would inevitably be victims of a forcible military takeover. How this would have played out at trial we'll never know; Dr. Kovacevic died of an aneurism in the detention center at The Hague after two weeks of his trial. How indeed would the prosecutor have proved specific intent? To be sure, Dr. Kovacevic never said to the Muslims in his audience that they would be better off getting out of town. The prosecutor would have underlined this omission. Yet a public official is not free to say anything he desires in public. If he had put the matter so plainly to the citizens of Prijedor, he would have been accused of not doing his job properly as deputy mayor. He would have been criticized for trying to get rid of half the population of the city instead of working with them and establishing conditions of peace and mutual trust. Thus, knowing what he knew about Serbian military plans, he could only speak in a kind of code. He said things such as "The Serbs and Muslims can never live in peace together even in a hundred years." Coming [pg128] from a Serb, this kind of talk could signal to the Muslims in his audience: "get out of town while you can." But the opposite interpretation is also possible: that Dr. Kovacevic was contributing to an atmosphere of hatred. Surely if he had himself acted overtly—such as signing an order for the destruction or harm or even incarceration of Muslim citizens, or participating himself in any acts of torture or murder—then his public speeches would have been sufficient, in my opinion, to satisfy the prosecution's burden to prove genocide. But without any overt act, with only the attribution of genocide to Dr. Kovacevic by virtue of his position as deputy mayor of the town, then the interpretation of his speeches as amounting to a specific genocidal motive would not appear to me to satisfy the prosecution's burden of proof.FN12

The foregoing dilemma of interpretation is, I suggest, often applicable to officials accused of participating in genocide. An individual official may have been doing his or her best to mitigate the evil, to spare as many lives as possible. It is easy after the fact for us to say that such an official should simply have resigned. But in a situation where the official is bucking a pervasive tide, resignation would simply lead to his or her replacement by a less principled person. The argument is a logical one: if a person of principle is morally required to resign rather than participate in a genocidal plan (a plan that she would do her best to frustrate if she stayed in office), then if she is replaced by another person of equal or higher principles, the same logic would compel the latter to resign as well. Hence, resignation out of moral scruples will tend to lead to replacement by persons who have no moral scruples. Accordingly, courts should be alert to these individual moral dilemmas and not be too ready to condemn any official "associated" with a genocidal plan (or other violations of humanitarian war) as legally complicitous with the crime. To do so would be to swing too far in a counterproductive direction. The requirement of specific intent in the definition of genocide should be proven by convincing evidence even if it may result in a protracted trial, due to the danger (of which

the Kovacevic case may be an example) not only of convicting an innocent person but of convicting a moral hero.

Conclusion: Coherence and Distinctiveness

The crime of genocide is the newest international crime. It must be kept as a separate, distinct, and coherent concept. It is the first truly subjective crime; all other crime, though requiring *mens rea,* require only that the defendant consciously committed the criminal acts. In the case of genocide, however, the underlying criminal acts are no different from the acts required to prove ordinary [pg129] crimes. The difference is one of motive. What is being punished by the crime of genocide is the selection of victims according to their involuntary membership in four kinds of groups: national, ethnical, racial, or religious. The distinctiveness of this new crime turns on how seriously prosecutors, defense counsel, and judges in future cases take and examine evidence of a defendant's motives.

The coherence of the crime of genocide is partly a result of taking specific motive seriously, but also a result of keeping the four enumerated groups clearly in mind. To extend the crime of genocide to killings—even mass killings—that are not based on membership in the four groups is to cheapen the concept and eventually render it redundant. If genocide, as I have argued, constitutes an advance in the development of human rights in our civilization, it ought to be interpreted and applied in accordance with a coherent and distinct interpretation of the remarkable language defining the crime that was brought into being by the Genocide Convention.

Footnotes

*Number in the format "pg119" etc. refer to the pagination in the original publication.

FN1 Rudolf J. Rummel, *The Holocaust in Comparative and Historical Perspective*, Conference on The "Other" Threat: Demonization and Anti-Semitism, Hebrew University of Jerusalem, 12 June 1995.

FN2 CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE (1951).

FN3 Ken Kress, "*Coherence*," in Dennis Patterson, ed., A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 533 (Blackwell, 1996). He adds: "[C]oherence theories of *law* have a special claim on us. The idea that law is a seamless web, that it is holistic, that precedents have a gravitational force throughout the law, that argument by analogy has an especial significance in law, and the principle that all are equal under the law, provide strong *prima facie* support for a coherence theory of law." *Id*. at 536.

FN4 The responsibility of the judicial enterprise in this regard may be contrasted with the freedom of legislatures. In the absence of a constitutional imperative requiring

legislative rationality or coherence, a legislature is theoretically free to enact statutes that conflict with or contradict one another. Even so, a court faced with inconsistent or conflicting legislation will typically apply various *judicial* tools of coherence—e.g., a rule that a more recently enacted statute supersedes a prior statute with which it conflicts.

FN5 RONALD DWORKIN, LAW'S EMPIRE 167 (Harvard Univ. Press, 1986).

FN6 *Id*. at 217.

FN7 *Id*. at 219.

FN8 RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944).

FN9 GA Res. 96(I), UN Doc. A/64/Add.1 (1946).

FN10 Convention on the Prevention and Punishment of the Crime of Genocide, UNTS No. 1021 (1951). The term "genocide" had appeared in the indictments of the Nazi defendants at Nuremberg, but not in the Charter of the International Military Tribunal nor in the opinions of the Tribunal.

FN11 I omit here the critical issue of whether Dr. Kovacevic was part of the authority and command structure of the town such that any genocidal acts could be attributed to him; i.e., did he give any such commands, or did he fail to stop any genocidal acts when he was in a position to do so? Because Dr. Kovacevic died while in detention at The Hague, this factual issue did not go beyond a preliminary exploration.

FN12 Of course, the reader should discount any bias in this argument due to my position as Dr. Kovacevic's lawyer. I've disclosed that relationship, and trust that my arguments will be read on their merits if any.